S. HRG. 100-648

OVERSIGHT OF THE GOVERNMENT IN THE SUNSHINE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
FEDERAL SPENDING, BUDGET, AND ACCOUNTING

OF THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

APRIL 19, 1988

Printed for the use of the Committee on Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE
85-671 WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S401-46

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OVERSIGHT OF THE GOVERNMENT IN THE SUNSHINE ACT

TUESDAY, APRIL 19, 1988

U.S. SENATE,
SUBCOMMITTEE ON FEDERAL SPENDING,
BUDGET AND ACCOUNTING,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:30 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Lawton Chiles (chairman of the subcommittee) presiding.

Present: Senators Chiles and Glenn.

OPENING STATEMENT OF SENATOR CHILES

Senator CHILES. Today we look back at 11 years with the Government in the Sunshine law. Supreme Court Justice Louis Brandeis wrote: "Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant and electric light the most efficient policeman."

When I came to the U.S. Senate in 1971 I was disturbed by the amount of public business I found being conducted behind closed doors and out of public view. I was appalled by the attitude of secrecy that I saw in our Federal Government agencies. I was not surprised that people were suspicious of their Government's motives and were losing confidence in their Government.

One of the first bills I introduced as a new Senator was the Federal Government in the Sunshine Act and the bill sought to assure the openness of our governmental process and to restore public confidence in those processes. In essence, I sought to legislate my strong belief that citizens have the right to attend meetings in which they have a personal interest. In addition, the news media and other interested groups should have a right to access which would assure a broader dissemination of information on public affairs.

In 1973, after much study and debate on the idea, I was joined by a number of my colleagues, including Senators Cranston, Hubert Humphrey, Mondale, Packwood, Proxmire, Roth, Stafford, Stevenson, Tunney, and Weicker, in introducing a refined version of the Government in the Sunshine bill. Finally, in August 1976, on the 200th anniversary of the Nation and after the Watergate incident, S. 5, the Government in the Sunshine Act, passed the Senate. It took effect March 12, 1977, thus reaffirming the belief that Government is a part of its people, not apart from its people.

For the first time, a large number of Federal agencies were required to conduct their most important meetings in public and people had a right to know now only what their Government was deciding but how and by what process.

While the Sunshine Act spells out specific exemptions and procedures, absolute compliance has in large part turned on the attitude of agencies. They must not only comply with the letter of the law but also the intent. In passing the law, it was our intention that even in those instances where a meeting was allowed to be closed, unless there was some strong prevailing reason, agencies would still try to open that meeting if they could.

It is my sense that on balance the agencies are making efforts to comply with the law. I say that hopefully.

According to a study of agency reports conducted by the Congressional Research Survey in 1986, the percentage of open versus closed meetings from 1979 through 1984 remained relatively unchanged. Forty percent were open, 42 percent closed, 17 percent partially closed. Only 16 of the 59 agency studies have closed more than 50 percent of their meetings, and many of those were to discuss litigation and law enforcement issues.

More recently, the General Accounting Office reviewed 12 agencies to determine compliance with the specifics of the law and they found that in general agencies were complying. Obviously, it is more difficult to document compliance with the intent of the law. Are the commission members actually discussing in a deliberative manner the issues at hand? I hope in most instances they are but without continual Congressional and public oversight, it would be easy to relegate meetings to a mere formality—brief discussion for show and passage of a new law or regulation.

Upon adoption of the law there were dire predictions about the effect it would have on the deliberative process. Certain members argued the Act impairs the ability of Federal agencies to fulfill their responsibilities and does not provide the public with useful information. As the author of the statute, I have always taken great exception with those arguments. I have heard them since I was in Florida in the State Legislature at the time that many were against sunshine and I have found that they just do not hold water. Furthermore, I think many that have tried and gone in with a good-faith compliance share my belief that compliance is not unduly burdensome. Furthermore, for those commissioners who find themselves dissenting from their colleagues, the Act is a means of informing the public of their dissent or agreement.

I do not doubt that compliance with the Sunshine law will continue to be a rocky road, but secrecy breeds rumors, distrust and suspicion. It insulates those who govern and it alienates those who are governed, and Congress in enacting this legislation was not acting to serve the interest of Federal agencies but rather the interest of the public.

That is the one thing that I think people miss often, that somehow because they are a member of an agency they think everything is set up for them and their convenience. I will agree with them, it is a lot more convenient to operate with the doors closed. It is a lot more convenient to not have to give anybody notice of

the meeting. It is a lot more convenient to not have to take a record of the meeting.

But what the hell is the purpose of Government all about? It is not for your convenience. It is literally to conduct the public's work and we are given this grant or license of power from the people—it is the way our system works—to conduct their business and they are entitled to know about their business, whether it is convenient for us or not and whether sometimes we have to take some hard decisions or not in public, that is good for us; it turns out to be.

And having, as I say, heard all of those arguments in the State Legislature, heard them all by the Senators, too, that we couldn't do markups in open session, and then seeing how it operates on the other side, if you decide that there is a prevailing reason and that prevailing reason is for the general welfare of the public and the fact that you are conducting these meetings for them and it is their Government and they are entitled to know, and that the cost of all of the inconvenience is much more than the suspicion or distrust and the other matters that follow when you close, then I think the whole thing changes.

With all of what I have seen, I think a key requisite for the Act working properly is if there is leadership from the top, and I have seen in several Administrations—the Carter Administration, there was leadership in the top that we want to conduct things in an open manner. I am afraid in this Administration that has not been true. There has not been that kind of leadership.

I hope in the next, whoever is the leader, that the call will be clear that we expect our commissioners, we expect our agency members to operate the public's business in an open and forthright manner, that it belongs to them.

As I leave the Senate I do so with the hope that the law will prevail and that Congress will continue to take seriously its oversight role. I believe that we will be a better Government for it and that the public does have a greater confidence today in its Government. I know that as the chosen representatives of the public we have to stand guard of the public trust if we are to preserve and ultimately be deserving of that trust.

Our first witness—and we will have a panel today—Eric Glitzenstein, who is a public citizen who has done some litigation work in this; and Peter Prichard of Gannett Newspapers. We will ask them to come to the table.

Eric, do you want to lead off for us this morning?

TESTIMONY OF ERIC GLITZENSTEIN, ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP [1]

Mr. GLITZENSTEIN. Thank you, sir.

Good morning. I thank the Committee for this opportunity to testify about the Sunshine Act, which was passed for the purpose of ensuring that multi-member Federal agencies would conduct the public's business in public. More than a decade after its passage, the Act remains one of the crucial cornerstones of our national commitment to open an accountable Government.

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[1] See p. 29 for Mr. Glitzentein's prepared statement.

As you noted in your opening remarks, Senator, the philosophical underpinning of the Act is the same as that which underlies the basic framework of our Constitution, that is, in the words of the Federalist Papers, "the people are the only legitimate fountain of power and it is from them that the constitutional charter is derived."

The Sunshine Act basically extends that philosophy one step beyond that laid out in the Constitution itself. In the words of the House report that was prepared in connection with the legislation, "Government is and should be the servant of the people and it should be fully accountable to them for the actions which it supposedly takes on their behalf."

But the statute is not animated simply by philosophical, theoretical objectives. Administrative experts, Government officials, representatives of public interest groups in testimony that preceded the passage of this statute, all commented, in perhaps less lofty but equally eloquent terms, about the basic practical objectives that are also served by this very important statute.

For example, former FCC Commissioner Glen Robinson explained that chief among the benefits of the legislation is increasing public understanding of administrative decision making processes: "If, in the light of sunshine, a Government agency shows itself to be deserving of trust, then by all means it should have it; conversely, if that same sunlight reveals an agency to be inept, inefficient and not in pursuit of the public interest, then obviously that agency does not deserve and should not have public trust."

Likewise, Kenneth Culp Davis, one of the leading scholars on administrative law, explained that he supported strong sunshine legislation because "making more of the realities known to the public would facilitate criticism and the principal result would be to improve the quality of what is done. Furthermore, the democratic influence would be stronger." He went on to say that "the relationship between agencies on one side and media and pressure groups on the other side would be improved because misunderstanding resulting from partial information as distinguished from full information would be reduced."

As even more succinctly summarized by John Gardner, the former Chairman of the Common Cause group, "citizens cannot hold Government officials accountable if they do not know what Government officials are doing."

Almost 12 years following enactment of the statute, I think it is fair to say that these philosophical and practical arguments for the law are as compelling as when they were articulated 11 or 12 years ago. In fact, there is every reason to believe that, for the most part, the Act has accomplished what it set out to accomplish.

According to the recent study prepared by the Administrative Conference of the United States, the Act has had a positive effect on the general openness with which agencies conduct their affairs. Even more specifically, according to the ACUS report, the Act's principal intended beneficiaries—journalists, public interest organizations, and others who regularly do business with Federal agencies—have gained a much better understanding of the basic forces at work in agencies and the bases of Government decisions.

There can be little doubt, therefore, that the Sunshine Act is by and large a successful law. Ironically, that very success has resulted, especially in the last few years, in both frontal assaults on the statute and more subtle means of avoiding the Act's requirements.

While these efforts at circumventing or evading the law have taken different forms, ranging from things like notation voting to staff decision making to efforts to broaden and incorporate the Supreme Court's recent decision in the *ITT* v. *FCC* case, they are all justified by the same vague refrain, and I think it is something that needs to be focused on in any discussion of the Sunshine Act, and that is that the Act has somehow impaired "collegiality" in Federal agencies.

While the critics of the Act acknowledge that the concept of collegiality is extremely difficult to define, that it is at best elusive and that the evidence of its impairment is even more elusive, they nonetheless insist—repeatedly in the last couple of years—that it somehow justifies a wholesale revision in or even the dismantling of the Sunshine Act. For several reasons, which I will quickly allude to and I am prepared to answer more questions about, I think it is difficult to imagine a more tenuous basis for subverting or scrapping a statute that has accomplished as many of its objectives as this one has.

To begin with, the collegiality complaint, at core, amounts, for the most part, to a simple preference by some Federal officials to avoid public awareness of their activities. Of course, that same preference was pressed on Congress when it first enacted the Sunshine Act and Congress decided to strike the statute's basic balance in favor of the public's right to know. Nothing has fundamentally changed in the last 10 years except, perhaps, that under this Administration an unprecedented number of appointees to Federal commissions are former businessmen who are used to meeting in corporate board rooms and well away from the glare of public scrutiny. But, as was true 10 years ago, the fact that some Federal officials prefer to operate without public scrutiny is hardly a justification for upsetting the statute's basic formula favoring disclosure.

Moreover, the champions of collegiality fail to recognize that open meetings frequently force agency officials to actually consider and respond to views that are on the other side of the spectrum from their own. In closed meetings, a majority of commissioners who generally vote as a block may have no incentive to discuss the ideas of dissenting members.

This is a point which has been alluded to, for example, by former Commissioner Asselstine of the Nuclear Regulatory Commission, who was frequently in the position of being the lone dissenting voter on many decisions made by the NRC. And he, in several discussions involving the NRC's effort to incorporate the ITT decision into the rulemaking process, noted that the only incentive that other commissioners on the NRC had to listen to what he had to say was the fact that there were other people out in the audience who would be able to gauge what the Commission was doing and write about what the Commission was doing—journalists and other, people monitoring that Commission's work.

Commissioner Asselstine's inference is that in closed meetings there is no reason whatsoever for those other commissioners to

listen to what that dissenting voice is. When you look at it from that vantage point, the obsession with collegiality appears to be largely a smoke screen for agency officials who are trying to avoid genuine discourse and debate on subjects of concern to the public.

The final point that the critics of the Act neglect to mention is that collegiality, however it may be defined and whether or not it is impeded by the Act, is not an end in and of itself. The relevant question, if there is one, is whether the Act has, overall, assisted agencies in conducting the public's business or whether it has somehow impaired the ability of agencies subject to the statute to perform that business.

But even the critics of the statute have conceded that there is no concrete evidence that the statute has in fact impaired the ability of commissions subject to it to conduct the public's business. In fact, as the ACUS study found, even agency officials who are expected to have some problems complying with the Act's demands, do not generally agree that the statute has actually impaired their ability to carry out the public's work.

On the other hand, the ACUS study, as well as other more informal sources, have generally agreed that the statute has caused commissioners to be better prepared. In blunt terms, people who are being watched performing their functions like to be on top of things. They like to feel that they are aware of the issues and can discuss those issues intelligently and completely and, from that standpoint, the statute has probably resulted in better discussions and hence better decision making.

I think the opponents of the Sunshine Act also have failed to come to grips with the fact that Congress, when this statute was first enacted, carefully crafted 10 exemptions to the open meeting requirement. Senator Chiles, as you noted in your opening remarks, these are exemptions that cover a broad spectrum of possible grounds for closing meetings, from national security issues to personnel matters to a broad exemption for any discussions which would "significantly frustrate implementation of a proposed agency action,"—an exemption is far broader than that contained in any other open Government law, such as, for example, the Freedom of Information Act, which is generally compared with the Sunshine Act.

It is little wonder, therefore, that in all the criticisms we have heard of the Sunshine Act agency officials have generally been unable to articulate precisely what kinds of meetings should be closed but have not been or cannot be under the exemptions as they are currently drafted, and are instead reduced to invoking the cryptic concept of collegiality.

In the final analysis, I would submit that the Act should not be permitted to fall victim to its own success in facilitating public scrutiny of the operations and activities of Government. To the contrary, hostility and resistance to the Act by the Government officials who may have those feelings about the statute—and I would submit that they are in the distinct minority, I think most Government officials have learned to live quite well with this law—but where those kinds of feelings exist, I believe they must be met with appropriate measures and sanctions.

If, in fact, agencies are attempting to circumvent the law, either indirectly through notation voting or staff decision making, that can be brought out into the open and pressure can be put on those agencies to abide by both the spirit and letter of the statute. Agencies that are doing things that are more directly an assault on the statute, such as adopting the ITT definition meetings in their regulations, that, of course, is something that either can be dealt with on the administrative level or, if necessary, through a legislative response.

In conclusion, almost a dozen years after its enactment, the Sunshine Act continues to shine brightly, casting its light on governmental agencies and activities that are of vital importance to the public. So long as efforts to dim the Act's glow are resisted as unwarranted and unwise, the Act can go on shining along with other stars in our constellation of open Government laws for at least another dozen years.

Senator CHILES. We are delighted to have with us today Senator Glenn, who is Chairman of the full Committee.

Senator Glenn, do you have any opening remarks?

OPENING STATEMENT OF SENATOR GLENN

Senator GLENN. Yes, I do, Mr. Chairman, just very briefly, just for about a minute here or so.

I am very pleased to be here at the Subcommittee's hearing on Government in the Sunshine Act. I do not know whether, with your decision to retire from the Senate, whether this will be the last hearing that you will conduct on this particular issue or not, but I do know that as the author of this statute, you very personally have worked very diligently over these past 12 years to oversee agency compliance with this very fundamental open Government law.

It has been your personal efforts that have assisted the public's right to know how the Government spends their money and reaches decisions affecting their businesses, their communities, and in fact, their very own individual lives.

The rationale of the Sunshine Act is very simple: "Citizens cannot hold Government officials accountable if they do not know what those officials are doing."

Now, that quote comes out of a statement directly from Senator Chiles' eloquent defense of the law in a 1984 Washington Post editorial, and I would ask unanimous consent that that be included in the permanent record of this hearing.[1]

Senator CHILES. Well, we might include that.

Senator GLENN. Mr. Chairman, I understand you will soon be receiving a report from the General Accounting Office on compliance with the technical provisions of the law by 16 different agencies. Now, I see you have an outstanding set of witnesses today to discuss whether these agencies are generally complying with the spirit of the law as well. These issues will continue to remain a high priority for this Committee.

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[1] See p. 65.

So, again, I congratulate you for your personal efforts for creating this landmark legislation. I do not overstate that. There would not be this law had it not been for Senator Chiles and it has served the American people so well. It has fostered a much higher level of trust in Government than would otherwise have been the case.

So I want to congratulate you for your efforts all through the years on this.

Senator CHILES. Well, thank you for your statement, but also thank you for your effort. As the Chairman of the Committee you have been very strong in your support and I look forward to that continuing to keep policing the law. Thank you.

Senator GLENN. Thank you.

Senator CHILES. Mr. Prichard.

TESTIMONY OF PETER PRICHARD, GANNETT NEWSPAPERS, REPRESENTING THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE NATIONAL PUBLISHERS ASSOCIATION,[1] ACCOMPANIED BY TONDA RUSH, ASSISTANT GENERAL COUNSEL

Mr. PRICHARD. Thank you, Senator Chiles.

Thank you for inviting me to appear here today for the American Society of Newspaper Editors and the American Newspaper Publishers Association. My name is Peter Prichard. I am a senior editor at USA Today and chairman of the American Society of Newspaper Editors Freedom of Information Committee. With me today is Tonda Rush, assistant general counsel of the American Newspaper Publisher's Association. We editors never go anywhere without our lawyers.

ASNE consists of 1,000 directing editors of daily newspapers across the country, and ANPA comprises nearly 1,400 daily and non-daily newspapers in the United States, covering about 90 percent of the daily and Sunday newspaper circulation. We would like to salute you for your leadership in making the Federal Sunshine Law a reality and I think we are delighted also to hear that Senator Glenn intends to keep it a high priority after you retire.

As you know, our organizations have been outspoken defenders of openness in Government. As the eyes and ears of the public, we try hard to monitor Government and to do a fair and thorough job of printing the news about the public's business. We believe that Government has a duty to be as open as it possibly can be about everything that it does because an open Government, in our view, is the very soul of democracy.

I will summarize my testimony here today and submit a more formal statement for the record, with your permission, sir.

Senator CHILES. Your full statement will be printed in the record.

Mr. PRICHARD. Thank you. We would like to urge the Congress to continue its vigorous oversight of the Government in the Sunshine Act. We know it is not a perfect law but we think it is a very important one. Although it leaves much of the Executive Branch untouched, the Sunshine Law has opened many Federal agencies to independent scrutiny and it works well when it works right.

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[1] See p. 36 for Mr. Prichard's prepared statement.

This last year ANPA conducted an informal survey of how well the law works. A staff member of ANPA interviewed the Washington bureau chiefs of five respected news organizations. We learned that in general these bureau chiefs believe that the agencies do not comply with the spirit of the Act. It is not so much a case of actually closing meetings. Instead agencies often conduct well-scripted meetings to fulfill the formalities of the law and then they often erect memorials in public to decisions that were actually made in private.

We have also noted, as Eric mentioned, another disturbing trend to weaken the Sunshine Act. The Supreme Court's 1984 decision in *ITT World Communications* v. *FCC* is a part of that trend. The Court held that three members of the FCC's telecommunications committee which met privately with foreign policy decision makers to discuss international telecommunications policy were not required to conduct their business in public. That small group of commissioners constituted a quorum of the FCC's telecommunications committee as we understand it.

The topic of their talks about opening foreign markets to United States telecommunications firms was clearly a topic of tremendous public interest but the Court ruled that the sessions did not constitute a meeting under the law. It said that because the group did not take action it was not a formal meeting.

This decision is troubling enough on its own. It is hard to imagine public policy formation that is of potentially greater impact than international telecommunications today. But beyond the implications for that subject alone, this decision could close doors where the need for discussion demands openness.

There are two problems that we see with the Court's narrow reading if it is carried through to the dealings of other agencies. First, it seems to invite scrutiny only of those acts that commissioners are formally empowered to make. If the converse is that we will never know about acts that they are not formally empowered to make, it takes little imagination to see the great potential for abuse.

Second and even more important, the ITT rules blinds us to information that we may need to understand how and why our Government arrived at is policies. When Government officials go about their jobs, they act in our names, in the names of the public. They speak for all of the public and they form opinions that the public needs to know. If we are offered only the formality of a commission vote or an agency's final decision by way of public explanation, we will be ignorant indeed.

As you have said, the Sunshine Act has always had its critics and recent years have produced a number of otherwise thoughtful public officials who disagree with the whole concept of Sunshine and open Government. What these people seem to be saying is that democracy is fine in its place but you cannot really get much done in public.

It is probably true that our Government could function more quickly in private but that does not mean that it would be functioning better. Public officials undoubtedly do speak more candidly to their own colleagues and to those who understand political reali-

ties, but that does not necessarily mean that they speak with greater wisdom or insight simply because they are speaking privately.

We also agree with your statement, Senator Chiles, that most agency members are committed to the public good and do their best to achieve that good, but one need not distrust the motives or actions of public servants to believe that both would benefit from more exposure. People do not long trust what they cannot know or understand. Government will not long have their consent if it does not have the public's trust.

My colleagues tell me that in practice the Sunshine Act does not work as well as it should. The problem seems to be not that the press is barred from attending meetings that they wish to attend, but often reporters do not wish to attend the meetings in the first place because that is not where the principal policy is made or important actions taken.

In many cases officials have not done their business in meetings, they only read their lines. I would not point our finger at any one agency because my colleagues did not do so, and undoubtedly there are some Federal agencies—probably those 40 percent that had open meetings—whose record shows scrupulous adherence to the Sunshine Act, and it is obvious from the statistics that you cited that the Federal Sunshine Law does not automatically produce open meetings. It should but it does not.

We also believe that the Federal Government may have a lesson to learn from the States' experience in open Government. I would note particularly the Sunshine State itself, the great State of Florida, where a strong open meetings law and vigorous enforcement have set an example worth noting. And in our view we think that the Federal Government should have an open meetings law at least as strong as that of any State.

Finally, we think that Congress has no more important mission than to ensure that the agencies to whom it has delegated the public's business act within the public interest. Neither the Congress nor the press nor the citizens nor the Government should sit idly by if openness is sacrificed to comfort of convenience and we would urge your Subcommittee to continue its vigorous oversight of how well this law is functioning.

I know it may seem quaint in our Washington world of anonymous leaks and spin control to dredge up this old quote, but I will. It is a quote from a famous Republican, Abraham Lincoln, and it is one of my favorites.

Mr. Lincoln said: "Let the people know the facts and the country will be safe."

Thank you.

Senator CHILES. I thank you both for your statements.

You mentioned the Florida law, which certainly was the progenitor of all of this, the forerunner, and also one of the strongest.

My experience stems from that. I was in the legislature before, during and after Sunshine was passed and I went through some of this same reasoning that I have seen many other people go through, saying to start with, why is this necessary, are we doing the right thing and why should we have to have this kind of open law? And then recognizing there was a price to pay for secrecy.

The reason I recognized that was because we had a very, very diligent press and the press kept reminding us and the people of that and it finally reached a point where you began to, at the public meetings that you went to, people began to say, how do you stand on the Sunshine Law? Are you one of these that is for opening or closing?

And the press made us throw them out of meetings of the Senate Chamber on an occasion that the Senate had gone into an Executive Session, and they took your picture as you went into closed meetings and they took your picture as you came out of the closed meetings, and they were the strongest force.

And the law is a very sort of simple law in Florida and has been really broadened and made into what it is by court decision, again, and the leader of that was the press in pressing those court decisions.

I want to tell you, it has been my dismay since I came to Washington to find that we did not have that kind of support up here when we attempted to pass the law. In fact, the leading pundits and columnists did not have much to say good about the law. If they said anything, it was not something good. They had their sources, their leaks, and they liked the sort of exclusive tone that their stories could have if they could tell you what took place in the closed meetings. And to have the meetings open, they would tell me, meant that you had to go and that everybody had an open shot and it kind of bothered them.

The difference was, in my mind—that all sounds very good—but having been in some of those closed meetings and read then the columns about those meetings, you realize that the leaker always has a way of putting a slide or spin and many times I almost did not recognize what happened or what as to what actually took place in that meeting, from what was written about that meeting.

Again, you pointed out the public confidence. I was on the Committee on Agriculture when I first got up here and I remember in the Russell Building where the meeting was there was a sign, "closed meeting, executive session," and I remember it bothered me what the public would think when they would walk up to that door and to see that sign. And when I went in there, we discussed the most mundane things that there was no reason in the world to close that meeting. There were no secrets. It was just, you know, the most boring thing that would be and I always thought how much better to have that door open because of what they thought was going on behind those closed doors.

But one of our problems, I think, even in following the law now is we have not had a press that writes about what they think goes on or finds out what went on in the past and continues to follow it up. And so I would just say, while it is the Congress' role to oversight, Congress is going to be a hell of a lot more interested in oversight if they have got a press that is a guardian and pressing that, too.

I am delighted to have your appearance and to know that you all are surveying. I wish we had a more aggressive and active force out there policing because I think that would be very, very helpful as well.

Mr. Glitzenstein, in your opinion, collegiality is not a significant reason for changing the definition to a meeting to exclude preliminary discussions from the provisions of the law?

Mr. GLITZENSTEIN. Based upon the arguments that I have heard and the information that I have been privy to, I do not believe there is any basic rationale for narrowing the definition of meetings that are covered by the statute. I would point out what I think is a central paradox in the whole argument we have heard about collegiality. In essence, the argument is that in the crucial give and take on decisions to be made by agency officials, when they are actually sitting down to roll up their sleeves and decide on agency policies, that is when collegiality is most important.

But under anyone's definition, those are precisely the kinds of discussions which have got to be covered by the Sunshine Act, when decisions are in fact being ironed out and being made. If you focus on preliminary discussions, background briefings by staff, those are exactly the kinds of discussions which no one has suggested collegiality is crucial to. And so what is being posed these days is a solution which even those people who are ardent believers that there is a collegiality impairment would have to acknowledge will not, under any circumstances solve the problem which they are purporting to solve.

I think the bottom line is that if you believe in open Government and you believe in the objectives of this statute, then you have to be willing to live with the fact that some agency officials are going to continue to be unhappy to some degree about meeting in public and discussing the public's business in public. That is a cost of this statute which I think is inherent and the response to it is not to alter the fundamental underpinnings of the law but to convince those agency officials that indeed they should comply with the spirit and letter of the statute.

Senator CHILES. Well, you heard Mr. Prichard's statement about the survey that they did. It was the feeling that much of the business is sort of taking place now in the background meetings and that the meetings themselves are more the showcase carrying out the script.

Is that your feeling? Or what have your findings been?

Mr. GLITZENSTEIN. Well, I think that varies considerably from agency to agency. I believe there are some commissions such as the EEOC and perhaps some others where that appears to be going on. I think there are other commissions where that is not happening and one of the reasons it is not happening is, as I referred to in my opening remarks, you have commissioners who will not allow that to take place.

If you have a dissenting commissioner who is not going to sit by and allow a scripted presentation of views to unfold, such as Commissioner Asselstine on the NRC, or some other commissioners, then that will not be a problem. I think, actually, that relates back to the collegiality point. If in fact you have a scripted presentation of views, what it means is that you have total consensus on that commission as to how things are going to be done.

And if that is true, then you do not have collegiality in that commission, you have a single-minded devotion to a particular way of doing business and the solution to that is not to close more Sun-

shine meetings; the solution to that is to make sure you get varying viewpoints on a commission and that those varying viewpoints be made apparent to the public in open meetings.

Senator CHILES. Mr. Prichard, what do you think is the best way we could get at this, you know, what you have mentioned as a disturbing trend?

Mr. PRICHARD. Well, I think one way, I would take your point that some reporters in Washington are more enamored of leaks than they ought to be. I think that is true. I would like to point out again that they do not necessarily represent the position of the American Society of Newspaper Editors or ANPA. We believe in open meetings and we believe in protesting closed meetings and I personally think that we should write more about staged meetings when they occur and write the story that says the commission is doing its business in private.

Senator CHILES. I think that would help tremendously.

Mr. PRICHARD. I agree with you. If we wrote more of those stories and protested more often instead of relying on anonymous leaks we would have more open Government and it would benefit ultimately the public and the press.

Senator CHILES. Well, I think that, again, would give the kind of courage to a commissioner who wants to do the right thing and it would also encourage the Congress from its standpoint of following and doing the oversight. That is kind of what, as much if anything, I would hope this hearing would be. You know, I started off by saying if we had someone at the top who clearly enunciated what I expect to happen in my Administration, that would be helpful.

Knowing that you do not always get that, or it is not as clear, then what are the other things that can happen? And certainly a Congress that is doing its job but also attention being called to it in the press, Ms. Rush, some lawsuits being filed when appropriate. Again, as I say, nothing has helped the Florida law more and pretty well you know whether your county commissioner is holding a pre-meeting breakfast before you go or something else, and the press is going to be bringing not only a story but there will be a suit that will follow that. And the courts time after time have come to the rescue of the Act or have actually broadened the Act.

Mr. PRICHARD. The other thing I think we would like to see, if it is true that 42 percent of the meetings are closed, if those statistics are true today, I think we would like to see Congressional hearings on why they are closed, if that is within your power to bring that off.

Senator CHILES. Well, we are getting those reports, and as you pointed out, Eric, in your statement, broad provisions of reasons for closing were included, and that was one way that we got the Act passed to start with, because people would raise the specter, national security, informants that you are dealing with, and law enforcement matters and some of these and we said, fine, we will take care of those because those are perhaps legitimate.

And you said the national law should be as strong as the State. Well, the State does not have a national security role and so there is a difference there. We think that is very legitimate but we think, again, under the Act you cite that reason, you take a vote, you agree to close the session for that reason, you take a transcript in

that session and then as you sanitize it you print what you can in that transcript.

But there are enough exceptions if you want to find a way to close the meeting, we know that you can kind of find some way to close it, as opposed to trying to find a way to open the meeting, and that is what we are pushing for, to try to see that.

Mr. Glitzenstein, today in your opinion are the agencies more likely to discuss in private what they used to discuss in public, or is it the other way?

Mr. GLITZENSTEIN. Well, again, I think it varies from agency to agency. I think that, as you noted in your opening remarks, a lot of this filters down from the top of an agency and even filters down from the very top of Government itself. If an atmosphere is created which is conducive to open Government, then I think agency officials, in the implementation not only of the Sunshine Act but the implementation of the other open Government laws—the Freedom of Information Act, the Federal Advisory Committee Act—will in fact attempt to carry out both the letter and purpose of those statutes. But if an atmosphere is created in which these statutes are viewed as, at best an annoyance or a frustration to be handled, or at worst, an active detriment to the agency's conduct of its business, then agency officials will do everything in their power to avoid conducting the public's business in public. And I think that has clearly happened at some agencies.

As I mentioned a moment ago, the EEOC—I know we are going to have another witness addressing this point—it appears that much of that agency's business is conducted in private and then simply mentioned in public meetings, and at the Nuclear Regulatory Commission, as I mentioned in my opening remarks, there was a sustained effort, which seems to have been put on the back burner but still lies dormant as we speak, to incorporate a very broad definition of "gatherings," that would no longer be subject to the Sunshine Act.

And the underlying rationale for those efforts to circumvent the statute is quite clear. It is simply that some agency officials do not wish to engage in discussions in public. And that is a problem that has to be addressed, I believe, in an ongoing fashion in all the ways that have been referred to here today—Congressional oversight, vigorous oversight by the press, and, when possible, through lawsuits.

I would point out that the ability of lawsuits to address those kinds of problems are quite limited because proving that an agency in fact is discussing matters off the record or is proceeding through other means to deal with the public's business is a very difficult process. I am not entirely ruling that out as one vehicle for revolving these kinds of issues but I think it is important to recognize that lawsuits cannot be viewed as a complete solution to many of the problems that confront this statute.

Senator CHILES. Well, we know when we passed the Act to start with there were those who had great fears of what it would do to the system, so to speak. In fact, Arthur Burns was my dear friend and he asked me to have lunch with him and he told me that he seriously felt he would have to resign if the Act passed; he felt that the Federal Reserve Board could not comply and that it would

affect their policies and that the Government's policies in setting any monetary policy would collapse. I mean, he was that distressed about it, and he is a very honest and sincere man.

It concerned me greatly that he had that fear. I felt as strongly that it was unfounded and tried to so convince him that it was unfounded and that he would be making a great mistake.

But it is interesting to see that in 1985 the Federal Reserve Board's general counsel said: "Our experience has been that open meeting requirements of the Sunshine Act are workable and that the burdens of compliance do not impair the Board's essential operations."

So Sunshine requirements were not that hard to comply with after all, so we see that much of the agency's willingness to comply is attributable to attitude.

But one of the Act's major purposes was to provide the public with the fullest practical information in reporting the decision regarding the decision making process. I would like to have both of your opinions as to whether the Act serves this purpose and does bolster the public's confidence in Government.

Mr. Prichard.

Mr. PRICHARD. Yes, I think it does bolster the public's confidence in Government. I think even though we do not have as many reports and stories about open meetings as we should, we have a lot more today than we had before there was a law and to that extent I think it bolsters public confidence. And in general, I think anything we can do to open more meetings—and I recognize the national security concerns or certainly the concerns of the Federal Reserve when they are setting monetary policy—but the more meetings and minutes that we can open to the public, I think the better off the country is going to be and the more confidence the public will have that the Government is being well run.

Because as Eric said, no one wants to be made a fool in public and I think it enhances public performance to hold meetings in public.

Senator CHILES. Mr. Glitzenstein.

Mr. GLITZENSTEIN. I agree with those assessments. I think whenever you are dealing with a situation like this you always have to say, basically, compared to what? Obviously, any open Government law could theoretically work better, it could get more information to the public. That is true with every one of the open Government statutes which we are familiar with and which has been in operation for a number of years.

But we do not live in a world in which every piece and scrap of Government information will be made available to the public and the public has become used to that, but they have also become used to knowing that oftentimes the fundamentals will be made available to them, and that is something which really does not occur in most other countries around the world and it is a part of our national heritage which I think we tend to sometimes get a little bit too blase about.

When you look at, for example, Great Britain, which not only has no open Government laws like the Sunshine Act, but has an Official Secrets Act, and you realize that a lot of other countries around the world pattern themselves after that kind of approach,

you come to appreciate a statute like the Sunshine Act and you come to recognize that the public really can learn a lot more about what Government is doing, even though it may not be a perfect situation.

One other point I would like to make along those lines is that oftentimes the groups that learn the most through the Sunshine Act are groups that have become real experts at monitoring specific agencies, what are called "attentive publics" in the phraseology of the Administrative Conference report. These are groups who go into meetings on a daily basis, or a weekly basis, and a cryptic phrase may be used by a commission. It will not mean anything to the most of us. It will not mean anything to a reporter from the Washington Post who may stop in only on the most important occasions.

But it will mean something to the person who, for example, writes for the Nuclear Information and Resource Service, who knows the intricacies and the ins and outs of the agency. Those people will go back and they will write the newsletters that maybe get distributed to 5,000 or 10,000 people and then every 2 or 3 months they hit on a story which does get into the Washington Post or does get into the New York Times. They are, therefore, the ones who can follow what is going on and really can translate what is happening in those meetings, even though it may be somewhat cryptic or covert, into something that the public can understand and can respond to.

So I think in those ways, which sometimes are quite subtle, the statute does accomplish many of its basic purposes.

Senator CHILES. I think that is an interesting observation.

I think many times we neglect to really sort of think through the process of how we govern now and much of the day to day regulation and laws that govern us come from agency officials of whom no one ever votes for, no one knows—citizens—how to write a letter to. They are not accountable in the ways that people think of this Government of being accountable.

But as we become more complex, as we have grown, Congress and the Administration have set up these quasi legislative, quasi administrative, quasi judicial bodies that day to day affect our lives as much or more so than the day to day decisions of the Congress or the day to day decisions of the President of the United States.

And this is the kind of invisible Government that we are talking about that the public should have a right to understand and that these people should be accountable, should have their actions take place and their decisions take place in the open. And I think sometimes, as I say, we fail to kind of think through the rationale.

I think the Supreme Court failed to think through the rationale a little bit in their decision and I think they got off on a tangent which was narrow and may have, in interpreting the law, may have been a very valid decision. But if they would think of the rationale, if they would think of the intent, if they would think of why that law was there to start with, they would understand that was somewhat of a crippling decision they gave and allowed those that did not want to operate under the broadest intent of the law a cover in order to go forward.

Well, I thank you very much for your appearance and for the efforts that you all give, your Society, and for what you have done with your group, Mr. Glitzenstein, and hope you will continue to do that.

Mr. GLITZENSTEIN. Thank you, Senator Chiles.

Mr. PRICHARD. Thank you.

Senator CHILES. Our next panel will be Ms. Ellyn Weiss, who practices before the Nuclear Regulatory Commission, and Claudia Withers, who practices before the Equal Employment Opportunity Commission.

We will lead off with you, Ms. Weiss.

TESTIMONY OF ELLYN R. WEISS, GENERAL COUNSEL, UNION OF CONCERNED SCIENTISTS, PRACTICING BEFORE THE NUCLEAR REGULATORY COMMISSION [1]

Ms. WEISS. Good morning, Mr. Chairman. Thank you for the invitation to come here today. I am not an expert in the Sunshine Act but I do know something about the NRC. I am General Counsel to the Union of Concerned Scientists and I have represented a number of States and citizens groups in many cases before the NRC in the past 15 years.

Over the past several years, the sun has not shone much over the NRC. While the Sunshine Act has not been significantly amended, despite the agency's efforts to do so in 1985, the Commission has become more expert in exploiting the available mechanisms to avoid meaningful deliberation of the issues before it in public.

This can be seen, I think, in the Commission's use of the notation voting and so-called "affirmation sessions." There are others, I understand, appearing before you who can give an insiders view on how the use of these mechanisms has evolved. It is certainly my observation over the past 15 years that they have come to virtually replace substantive discussion in public.

As CRS has documented, NRC places no restrictions on the type or importance of the issues which may be resolved in this manner. So long as the agency believes that, no interactive discussion among all commissioners is necessary, end quote, papers are circulated among the commissioners and the Secretary until a decision is reached. A public meeting is then held during which the sole action taken in public is that the commissioners say aye or nay in response to the call of the roll. None of the circulated materials are ordinarily made public, other than the final decision.

I am aware that there is a school of thought that Congress should essentially ratify the practice of those agencies which most strongly resist Sunshine by broadening the Act's exemptions to allow some types of deliberations to be held in private.

I disagree with that view. I believe that Congress struck the correct balance between public access to the decision making process in a democracy and the need to protect the ability of the agencies to carry out their responsibilities. Public policy in this area should not be driven by the agencies most fearful of and resistant to

[1] See p. 43 for Ms. Weiss' prepared statement.

public scrutiny. It is not the Sunshine Act that has caused public collegial deliberation to disappear at the NRC, nor will any changes in the Sunshine Act restore collegiality as much as I would like to see it restored.

NRC has for the past 7 years mounted a substantial across-the-board assault on public participation in its decision making. It has amended its rules to make many important actions which previously would have been subject to prior notice and hearing opportunity no longer so. It has repeatedly told its licensing boards they may not inquire into important safety issues. It has attempted to remove whole classes of issues related to emergency planning from the public hearing provisions of the Atomic Energy Act.

These are just a few examples of the prevailing climate of public phobia at the NRC. The Commission's disdain for the Sunshine Act is only one piece of a larger mosaic. What is needed at the NRC is commissioners who understand that their overriding obligation is to the public. It is my hope and expectation that that will happen in the future and when it does I am confident that the Commission will not find the Sunshine Act and unreasonable intrusion into its deliberative processes.

It would be a great mistake to accommodate the public's rights under the Sunshine Act to the NRC's phobic fear of exposing itself to view.

The dangerous consequences of closed-doors decision making can be plainly seen in a remarkable set of transcripts released pursuant to a court decision in the case of *Philadelphia Newspapers* v. *NRC*. These meetings had to do with the restart of Three Miles Island Unit 1 and they show, among other things, systematic subversion of the intent of the rules against *ex parte* contact—an agency which was spoon fed one version of the facts, frequently inaccurate, by its staff at the same time that that staff was a formal party to the underlying case and was advocating the position of the utility company. The other parties were utterly shut out of this process, had no way to know what the Commission was considering, much less an opportunity to present the facts on the other side.

The Sunshine Act was intended to prevent exactly what NRC was doing. If properly implemented, the Act furthers several goals, not the least of which is better Government decision making. Agencies make better choices when they have heard all the evidence and arguments on all sides. This can only be ensured if their decisions are made in public. Secrecy invites abuse.

This Committee deserves much credit for refusing to abandon the principles of the Sunshine Act and I am confident that you will continue to do so.

Thank you, Mr. Chairman.

Senator CHILES. Thank you, ma'am.

Ms. Withers.

TESTIMONY OF CLAUDIA WITHERS, STAFF ATTORNEY, WOMEN'S LEGAL DEFENSE FUND, PRACTICING BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION [1]

Ms. WITHERS. Senator Chiles, thank you.

My name is Claudia Withers and I am Director of Employment Programs at the Women's Legal Defense Fund here in Washington.

I appreciate the opportunity to testify before you this morning about the Fund's experiences with Government in the Sunshine. I will be speaking about our experience with the Equal Employment Opportunity Commission.

The Women's Legal Defense Fund is a private, nonprofit membership organization founded to eliminate sex discrimination in the law, or at least hope to attempt to eliminate it, primarily in the areas of family law and employment. We employ a variety of strategies to achieve our goal, including monitoring and advocacy, counseling and *pro bono* representation and public education.

As part of our effort to advance the law in the area of employment, and to ensure that women achieve true equal employment opportunity, we monitor the activities of those agencies charged with implementing the antidiscrimination laws: the Equal Employment Opportunity Commission, the Department of Justice, and the Office of Federal Contract Compliance Programs in the Department of Labor. We comment on proposed regulations, we meet with agency officials about policy proposals, we attend public sessions and we collect data about agency performance.

We provide technical assistance to Congress as it fulfills its oversight responsibilities. We try to share the information that we have collected with our constituency and the public so as to affect for the better the development of agency policy and to make the agency more accountable for its actions.

As part of those monitoring activities that I have described, we have sought, as members of the public, to attend regularly the open meetings of the EEOC. In 1985, after almost weekly attendance for a number of months in succession, it became quite clear to us that the EEOC conducted little business of any real substance at its public sessions. It appeared that substantive issues were discussed in detail outside the public meetings.

In the meetings at which we were present, the "open meeting," generally consisted of a barely audible presentation by a staff person followed by some minimal discussion from the commissioners with, all too often, a unanimous vote following that. In many cases, the only reason that we understood anything at all about what was going on was that we followed EEOC activities regularly, and often we did not know what was going on.

The open portion of the meetings were very short. The average length of time was 5 to 10 minutes. Attempts to get copies of documents that were discussed at the meeting took at the least patience and perseverance. They were never available to us at the meeting. We had to follow up with individual staff members afterwards.

Often commissioners referred to documents which were never made available to us. On a number of occasions, meetings were

[1] See p. 48 for Ms. Withers' prepared statement.

cancelled or rescheduled with little notice. Often we arrived at a scheduled 9:30 a.m. meeting only to discover that a decision to cancel the meeting had been made at 5 p.m. the night before.

Similarly, agenda items were rearranged at the last minute, making it difficult to know beforehand what topics might be covered at a particular meeting, and that is where we began our practice of attending every meeting, because we never knew what was going to be discussed when. Issues were often decided by notation vote; that is, a vote taken outside of the meeting after information on an issue was circulated to commissioner's offices.

Because of our concern that little policy was being made in the sunshine, we filed a series of Freedom of Information Act requests in January of 1986 to obtain more information regarding EEOC policy making. We requested access to such information as minutes and transcripts of EEOC meetings, records of meetings of special assistants and correspondence between special assistants and EEOC commissioners. We also requested a waiver of processing fees on the theory that our primary interest in the information was to benefit the public.

We were informed that some of the information that we asked for was indeed in the public domain but we were not made aware of this until after we had filed FOIA requests. Our request for a fee waiver was denied; the Commission was of the opinion that the information that we sought was not primarily for the public but for the primary benefit of our specific constituency—women.

Senator CHILES. There is a difference?

Ms. WITHERS. Apparently! The Commission also challenged the Women's Legal Defense Fund's qualifications to monitor the EEOC or to disseminate information. It contended that our fee waiver was unnecessary because, after all, Congress monitors the agency and that is quite enough. We appealed the denial of the waiver of processing fees and when that appealed was denied we filed a lawsuit. We were represented by the Public Citizen's Litigation Group in that effort.

We settled our lawsuit in November of 1986 and under the terms of the settlement agreement, the Commission waived all search and duplication fees for those non-exempt records that were responsive to our request. They also paid attorneys fees and costs. We felt at the time that the settlement of the case was an important step in making the agency aware of our concerns and in making the agency's policy development process a more open one and one more accountable to the public.

As a result of filing those FOIA requests and settling our lawsuit, we were able to listen to tapes and review minutes of earlier EEOC meetings to try to determine what the decision making process had been. We observed generally from the information that we saw that discussions of substantive issues appeared to be more lengthy during the years before 1981. We noted a heavier reliance on the use of notation votes beginning in about 1982, which meant that at that time there began to be less public discussion of some issues.

Meetings began to be taped around 1984, but as we listened to the tapes, it was often difficult to follow what was going on in a meeting and so it was difficult to figure out what was going on

with regard to policy making. The provision of background documents along with minutes or along with the tapes was inconsistent; that is, sometimes there were documents attached, sometimes there were not.

We do not believe that the process has become more open, certainly as a result of the lawsuit that we filed. While we have not been able to attend as many open meetings this past year as before, our impression has been that the Commission is conducting business as usual from the standpoint of developing policy in the sunshine.

There does not appear to be a regular meeting time for the open sessions. It seems to vary. The phone number which is given in the Federal Register for the public to obtain information about meetings often rings unanswered or provides incorrect information. And again, it is only because we follow the Commission's activities with some regularity that we are able to go through four or five levels of information to find out when there is an open meeting or what activities are going to be discussed.

On several occasions, WLDF's staff that have attempted to attend open EEOC sessions have missed such meetings entirely by being 2 to 5 minutes late. On at least two occasions, staff members attempting to get into open meetings have had problems getting past guards who explained that they had not been told to expect anyone.

Because the Women's Legal Defense Fund and other civil rights organizations have experience with dealing with the EEOC and have developed some amount of expertise on the substantive issues, we try to and do find other ways of having an impact on the policy making process, including participation in Congressional oversight activities.

However, we are disadvantaged by a policy making process about which we can only complain after the fact and which thus suffers from the lack of contemporaneous input. It is clear to us that individuals and groups who have less experience and less time but who clearly have a right to participate are severely disadvantaged by a process which may adhere to the letter of the Sunshine Act but which sorely tests its spirit.

The EEOC is responsible for administering laws and developing policy which ensure equal employment opportunity for all workers. That responsibility includes ensuring that the public gets a fair chance to participate in the decisionmaking process. Our experience would indicate that we are not getting such an opportunity.

Thank you.

Senator CHILES. I thank you very much for your statement.

I know, Ellyn, you are familiar with the Philadelphia Enquirer's articles regarding the NRC. The newspaper obtained transcripts of 28 closed meetings in which the Commission discussed the Three Mile Island incident. During one meeting in late 1981 the Commissioners considered having a public meeting in Harrisburg, which as you know is situated 10 miles from the Three Mile Island plant.

According to one article, this is what the Chairman said about that proposed meeting: "My frank opinion and deep seated feeling is I do not want to have a meeting where a lot of people from the public just get up and rant and rave."

Was this comment symbolic of the Commission's attitude towards the public in general? And from your experience, has that attitude at all changed over the years?

Ms. WEISS. I think it is perfectly typical. I happened to read through that transcript before I came up to this meeting and those same sentiments were expressed by other commissioners, and it has gotten worse—far worse—over the past 7 years.

I suspect that shows up statistically in the number of notation votes, but it also shows up in ways that cannot be measured, such as was mentioned in the previous panel, scripted meetings. That is what we see. When there are public meetings, there is no spontaneity whatsoever. There is no deliberation. There is either a lecture complete with a slide show, a staff lecture, or a public drama where the Commission has decided it is important to make some point and will carry out the drama in public that has clearly been scripted.

Senator CHILES. Well, there have been proposals to create a single administrator at the NRC. Do you think that is a direct effort to avoid sunshine?

Ms. WEISS. I think that the motivation of some people who have proposed that is certainly to obviate the Sunshine Act and it would, of course, be the result. It would exclude the Commission from the requirement to take any action in public and it would also increase the control of the Office of Management and Budget. So it would certainly have, for both of those reasons, the effect of further insulating the Nuclear Regulatory Commission from any contact or scrutiny by the public on whose behalf it is supposed to be acting.

Senator CHILES. Claudia, could you elaborate briefly on the impact of the Equal Employment Opportunity Commission. What is its impact on the public and how many charges does it handle per year?

Ms. WITHERS. I do not know the exact number but it is somewhere upwards of 60,000 or more charges a year. It is the lead Federal agency that is obligated to implement antidiscrimination laws. By executive order, it is supposed to coordinate EEO policy for the entire Federal Government and thus has a very important impact on how antidiscrimination law is interpreted and how workers are affected by those laws.

Senator CHILES. So it is our flagship or our lead agency towards saying that we are going to protect the public and that we are going to comply with what is the existing law of the land regarding equal employment opportunity?

Ms. WITHERS. No question. The public and indeed the courts defer to the EEOC's interpretation of the laws that it administers, so it is quite important what the Commission does and thinks about EEO laws.

Senator CHILES. Well, if there was ever an organization that ought to be trying to maintain and obtain the public's confidence, it should be this commission, should it not?

Ms. WITHERS. I would agree with you. And the EEOC often bemoans the fact that it as an agency is not given sufficient respect or authority, but it is sometimes difficult to have that impression

when one is trying to find out how policies are made as a member of the public.

Senator CHILES. Well, from the litany that you have given me today on the changing of meeting times, failure to provide materials, all of the different devises that you say that they are using, they seem to be doing very little to earn that confidence and respect of the public.

Ms. WITHERS. I suspect that you are right, Senator. The Commission has passed a lot of policies in the last several years which it says will make it a strong law enforcement agency. However, in many situations the way it goes about deliberating on those policies makes us somewhat uncomfortable because it is difficult for the public to have input.

The kinds of things that I described are perhaps annoyances to individuals who live and work in Washington and who monitor agencies regularly, but they are complete roadblocks and obstacles for members of the public who are trying to find out what is happening at their commission.

Senator CHILES. Can you tell me why you think the Nuclear Regulatory Commission has this sort of public phobia, Ellyn?

Ms. WEISS. Well, I think it is because the Commission is well aware that an awful lot of the action that they take is not popular with the public, which is their supposed constituency, and that if people had a vote they would not vote to continue the Nuclear Regulatory Commission's policies.

And for the same reason that the South African Government kicks reporters out of South Africa, the NRC wishes to have no coverage of those of its actions which are least popular. And I do not mean to set up an analogy, but the motivation is essentially the same. I mean, to the degree to which you can get the messy, ugly stuff done in private, it facilitates your ability to do that.

So there is a lot of that going on. And there is also a desire to avoid personal embarrassment. If you have a meeting in secret, you can come ill-prepared and you can ask questions that are not very informed and that show, perhaps, you have not done your homework. But that is an embarrassing thing to have to do in public. And also to avoid embarrassment to the nuclear industry.

One would not like certain facts to come out in public because they reflect poorly on the nuclear industry. They might suggest that there are safety problems that the NRC would rather not talk about. So there are a variety of reasons that motivate the current commissioners to choose to the extent that they can to conduct their business outside of the public view.

Senator CHILES. Well, I thank you both for you testimony and your appearance here today. Your statements are very interesting to us and they are really something that we will attempt to try to follow up on in the Committee.

Ms. WEISS. Thank you, sir.

Ms. WITHERS. Thank you, Mr. Chairman.

Senator CHILES. Our third panel will be Commissioner Anne Graham of the Consumer Product Safety Commission.

TESTIMONY OF ANNE GRAHAM, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION [1]

Ms. GRAHAM. Good morning, Mr. Chairman. Thank you.

I am pleased to appear before the Subcommittee today to discuss the importance of the Government in the Sunshine Act. I would like to preface my remarks by commending you, Chairman Chiles, for recognizing the importance of the public's need to have access to the decision making process and for being instrumental in the creation of the Sunshine Act. Without your dedicated efforts we would not be here today.

I believe that the Sunshine Act has a major and positive effect on the way Government agencies do business. By opening the doors and giving public access to the decision making process of collegial agencies, the Sunshine Act has strengthened accountability. The Act also continues to keep public policy makers from being isolated from public input.

Further, the Act ensures that public officials are under constant scrutiny. I believe that this is particular important at the Consumer Product Safety Commission because this body is concerned with health and safety issues.

The Commission has been committed to the principle that in order to ensure public confidence and to fulfill its mandate to protect the consumer from unreasonable risk of injury associated with consumer products the public needs to be involved as much as possible in the decision making process.

The Commission has taken the Sunshine Act a step further by adopting an internal regulation that provides that the Commission business will generally be conducted in public. The regulation requires that whenever commissioners or commission staff have meetings with members of the public involving matters of substantial interest, with limited exceptions, public notice of the meeting must be given and the public be permitted to attend.

The Commission's regulations not only require that the public have access to meetings but that the public may participate in setting Commission priorities. The public is invited to make oral presentations to the Commission. This participation gives the public not only a chance to be informed but also a real possibility of setting Commission policy.

The Sunshine Act deals with a delicate balance, a balance between providing the public with information and not impeding collegial agencies from conducting their regulatory responsibilities. I believe that this need to balance the requirements of public openness and the ability of the Government to carry out its responsibilities has been adequately addressed in the Sunshine Act. The Act and the legislative history make it clear that under specific circumstances meetings may be closed.

Under the Commission's Sunshine Act regulations, for example, compliance meetings are exempted from the Sunshine Act, since having these sessions in an open forum could possibly interfere with potential or existing enforcement proceedings.

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[1] See p. 58 for Ms. Graham's prepared statement.

In my opinion, there has been no reluctance on the part of my fellow commissioners or on my part to discuss candidly substantive issues that have come before the Commission. Thus, the Sunshine Act has not hindered the Commission in functioning. In fact, I believe the Sunshine Act has enhanced the debate and candor at the Commission.

Thank you. I would be happy to try to answer any questions.

Senator CHILES. That is interesting because you are dealing with issues that are highly sensitive, highly explosive, as to whether certain products are safe, whether children are being protected. I cannot see a lot of difference between the issues you are dealing with, you might say, and the issues the Nuclear Regulatory Commission are dealing with.

Perhaps an accident of the Nuclear Regulatory body or a faulty decision might injure or kill more people, but whether we are going to have three-wheel vehicles allowed on the road, which we have seen have killed an awful lot of young people, or certain substances that could catch on fire in a crib and burn up babies, or gas them or asphyxiate them, all of those are major issues.

You haven't felt that it has handicapped your Commission in any way in talking about these in public?

Ms. GRAHAM. Not at all, Mr. Chairman. I think it is very important, particularly when we see a problem, to let the public know immediately. I see our responsibility as two-fold; eliminating unreasonable risks, but also letting the consumer know about the risks. And as you mentioned with the all-terrain vehicles, that in part is an example of the consumers just not knowing the risks involved with the machine.

So I think it is very important to operate in an open situation and I think it is healthy to have that debate in the public.

Senator CHILES. Well, I am delighted with that and I think if more of the agencies went in with that attitude they would find the same thing. A former commissioner of another agency suggested that the Sunshine Act is counterproductive and seriously impairs the ability of agencies to fulfill their responsibilities, fails to provide the public with useful information on Government decision making.

I take it then you do not agree with those criticisms?

Ms. GRAHAM. I certainly do not. I think that the openness provides a greater debate and I think that it is important to hear what the public thinks about the issues when we are making decisions.

Senator CHILES. I know you have sometimes dissented in decisions made by your Commission. How important is it, would you say, for the public to see dissent and serious discussion in agency decision making processes?

Ms. GRAHAM. I think it is extremely important. I think one of the reasons we have collegial bodies is to debate the issues fully before we make decisions and I think the American people have a right to know everybody's point of view and have the opportunity, because of the Sunshine Act, to go to the commissioners in advance of a decision and give them their point of views.

Senator CHILES. In your opinion, how much of a role does a commission chairman play in determining the actual depth of public discussion and debate?

Ms. GRAHAM. I think that the chairman of any commission has an added responsibility because he or she is setting the tone for the entire agency and the direction given at the top is going to be paid attention to by the commission's staff.

Senator CHILES. The general counsel of the Consumer Products Safety Commission said in an 1985 letter the Commission would be better able to carry out its mandate to protect the public if it could more freely discuss budget, legislative activities and certainly certain types of prerule making matters in closed session. He went on to say, if the Commission were to meet in closed session it could discuss more freely and frankly potential safety problems without the fear of premature and possible undue public concern.

Now, I know the Consumer Products Safety Commission has an important mandate to protect the consumer, but it seems ironic to me that someone might feel that they could better protect the public by keeping things behind closed doors.

Do you agree with that?

Ms. GRAHAM. I do not. I think that the benefits of the Sunshine Act outweigh some minor inconveniences. As I mentioned in my opening statement, we do have exemptions, for example, when we deal with compliance matters. I just feel very strongly that the Sunshine Act is a benefit to the public and that it gives the public an opportunity to be aware of the issues and to have a free flow of information.

Senator CHILES. There has been a constant effort by the Administrative Conference of the United States and others to tamper with the Act by changing the definition of meeting to allow discussions not resulting in decisions to take place behind closed doors. I personally think this would be very weakening and dangerous.

What is your opinion on that?

Ms. GRAHAM. I agree with you. I think that, as an example, at the Consumer Products Safety Commission we have many, many meetings that do not result in a formal decision. For example, we are looking into lawn mowers and indoor air pollution and we do not have a major role, but we have a role. I think it is important for the public to have the opportunity to hear the debate and hear the concerns even though we may not be making an imminent decision on the issue.

Senator CHILES. Well, we thank you very, very much for your appearance and we are delighted with the attitude that you have. We wish we could see that in all of our members of these agencies.

Ms. GRAHAM. Thank you very much.

Senator CHILES. Thank you, ma'am.

We will recess our hearings now. I am delighted to note that in our audience we have Representative Larry Hawkins, who is a member of the Florida Legislature who still leads the Nation in Sunshine and seems to again always be finding ways generally to broaden the law, although there is some effort even in Florida to proscribe the law. But Representative Hawkins has been one of those that has always attempted to broaden the law and we are delighted to see him here today. We would put him under oath and have him testify if we had other members here because we know he would be persuasive.

We are also delighted to see Janet Studley who was a lawyer for our Subcommittee and did such invaluable work as we were trying to pass the original Sunshine Act and also helped us police it for a number of years. We are delighted that in her private practice she still adheres to the Sunshine on most occasions.

We will recess our hearing now until the further call of the Chair.

[Whereupon, at 11:00 a.m., the Subcommittee adjourned subject to the call of the Chair.]

APPENDIX

STATEMENT OF ERIC R. GLITZENSTEIN
PUBLIC CITIZEN LITIGATION GROUP

April 19, 1988

I thank the Committee for this opportunity to testify about the Sunshine Act, which was passed in 1976 to ensure that multi-member federal agencies would conduct the public's business in public. More than a decade after its passage, the Act remains one of the crucial cornerstones of our national commitment to open and accountable government.

The philosophical underpinning of the Act is the same as that which underlies the basic framework of our Constitution, i.e., that, in the words of the Federalist Papers, "the people are the only legitimate fountain of power, and it is from them that the constitutional charter . . . is derived." As explained by the House Report prepared in connection with the Act, sunshine legislation simply represents a logical extension of the principle that "[g]overnment is and should be the servant of the people and it should be fully accountable to them for the actions which it supposedly takes on their behalf."

In less lofty but equally eloquent terms, administrative experts, government officials, and representatives of public interest groups articulated -- in testimony preceding the Act's passage in 1976 -- the practical virtues of sunshine legislation. For example, former FCC Commissioner Glen O. Robinson explained that "[c]hief among the benefits [of the legislation] is increasing public understanding of administrative decisionmaking processes . . . if, in the light of sunshine, a Government agency shows itself to be deserving of trust, then by all means it

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should have it; conversely if that same sunlight reveals an agency to be inept, inefficient, and not in pursuit of the public interest, then obviously that agency does not deserve, and should not have, public trust."

Likewise, Kenneth Culp Davis, one of the leading scholars on administrative law, explained that he supported strong sunshine legislation because "[m]aking more of the realities known to the public would facilitate criticism, and the principal result would be to improve the quality of what is done. Furthermore, the democratic influence would be stronger. The relation between agencies on one side and media and pressure groups on the other side would be improved, because misunderstanding resulting from partial information, as distinguished from full information, would be reduced." Or, as even more succinctly summarized by John Gardner, the former Chairman of Common Cause, "[c]itizens cannot hold government officials accountable if they do not know what government officials are doing."

Twelve years following enactment of the statute, these philosophical and practical arguments for the law are as compelling as when they were first expressed. Moreover, there is every reason to believe that the Act has, for the most part, accomplished its basic objectives. According to a recent study prepared for the Administrative Conference of the United States, the Act "has had a positive effect on the general openness with which agencies conduct their affairs." More specifically, according to the ACUS report, the Act's principal intended

beneficiaries -- such as journalists, public interest organizations, and others who regularly do business with federal agencies -- have gained a much "better understanding of the basic forces at work [in agencies] and the bases of [government] decisions." These groups uniformly agreed, according to the ACUS study, that closely monitoring the work of agencies has become a great deal easier since the passage of the Act.

There can be little doubt, therefore, that the Sunshine Act is, by and large, a successful law. Ironically, that very success has resulted, especially in the last few years, in both frontal assaults on the statute, and more subtle means of evading the law's requirements. While these efforts at circumventing and watering down the statute have taken different forms -- from an increase in the use of notation voting and staff decisionmaking to narrowing the definition of "meetings" that are covered by the law, in accordance with the Supreme Court's decision in FCC v. ITT World Communications -- they are all justified by the same vague refrain: that the Act has somehow impaired "collegiality" in federal agencies. While the critics of the Act acknowledge that the concept of collegiality is, at best, elusive -- and the evidence of its impairment even more so -- they nonetheless insist that it somehow justifies a wholesale revision in, or even the dismantling of, the scheme carefully crafted by Congress a dozen years ago. For several reasons, it is difficult to imagine a more tenuous basis for subverting or scrapping a law that has largely accomplished its objectives.

To begin with, the collegiality complaint, at core, amounts to little more than a preference by some federal officials to avoid public awareness of their activities. Of course, that same preference was pressed on Congress in 1976, and it decided to strike the statute's balance in favor of the public's right to know. Nothing has fundamentally changed in the last decade, except that, during the Reagan Administration, an unprecedented number of appointees are former businessmen who are used to meeting in corporate board rooms and well away from the glare of public scrutiny. As in 1976, however, the fact that some federal officials would feel more secure if the public did not monitor their decisions and activities is hardly a justification for upsetting the statute's basic formula.

Moreover, the champions of collegiality fail to recognize that open meetings frequently force agency officials to actually consider and respond to views that are on the other side of the spectrum from their own. In closed meetings, a majority of commissioners who generally vote as a block may have no incentive to discuss the ideas of dissenting members. Only in meetings conducted under the watchful eyes of the press and the public is there any pressure on commissioners to really listen to one another and coherently explain why certain policies are being pursued instead of others. When viewed from this vantage point, the obsession with "collegiality" appears to be simply a smoke screen for agency officials who are trying to avoid genuine discourse and debate on subjects of concern to the public.

Another point that the critics of the Act neglect to mention is that "collegiality," however it may be defined and whether or not it is impeded by the Act, is not an end in and of itself. The relevant question is whether open meetings have helped or hurt agency policy making. As the ACUS study concluded, however, there is no consensus among agency officials, let alone concrete evidence, that agency decisions have in fact suffered as a result of the Sunshine Act. On the other hand, it appears that the Act has caused commissioners to be better prepared for meetings at which decisions are made, and, therefore, it seems reasonable to assume that the statute has, if anything, improved agency policy making.

The opponents of sunshine also fail to come to grips with another basic reality -- that Congress carefully drafted ten exemptions to the Act's open meeting requirements. Thus, agencies can already close meetings for a host of legitimate reasons -- ranging from national security discussions to meetings regarding agency personnel practices to any agency deliberations that, if open to the public, would "significantly frustrate implementation of a proposed agency action." It is little wonder, in view of these exemptions, that agency officials have generally been incapable of articulating precisely which kinds of meetings must be closed but cannot be under the law as currently written, and are instead reduced to invoking the cryptic concept of collegiality.

In the final analysis, the Act should not be permitted to

fall victim to its own success in facilitating public scrutiny of the operations and activities of government. To the contrary, hostility and resistance to the Act by government officials should be met with appropriate measures and sanctions. For example, any agencies that are engaging in increased notation voting or staff decisionmaking in order to avoid public meetings should be pressured, through oversight hearings such as this one or other appropriate measures, to comply with both the spirit and letter of the law.

Likewise, whatever the merits of the Supreme Court's ITT decision in the narrow, unusual context of its own facts, it clearly should not be used as a blueprint by agencies for developing general rules narrowing the definition of meetings subject to the Act. As the Nuclear Regulatory Commission's experience dramatically demonstrates, any such rules will invariably open up gaping loopholes in the law which could be used to close -- without even the benefit of any procedural safeguards, such as transcripts or judicial review -- virtually any meeting that an agency desires to keep from public view. Thus, any evidence that agencies are relying on the ITT decision will necessitate a firm legislative response, either by expanding the Act's definition of meetings or, at a minimum, requiring agencies to adopt appropriate safeguards.

A dozen years after its enactment, the Sunshine Act continues to shine brightly, casting its light on governmental agencies and activities that are of vital importance to the

public. So long as efforts to dim the Act's glow are resisted as unwarranted and unwise, the Act can go on shining -- along with the other stars in our constellation of open government laws -- for at least another dozen years.

PETER PRICHARD

SENIOR EDITOR/NEWS

USA TODAY

Thank you, Mr. Chairman, for inviting the American Society of Newspaper Editors (ASNE) and the American Newspaper Publishers Association (ANPA) to present their views on the Government in the Sunshine Act. My name is Peter Prichard. I am senior editor for news at USA Today and chairman of ASNE's Freedom of Information Committee. USA Today is a member of ANPA, which joins ASNE in this statement.

ASNE, which has just completed its 65th annual convention in the nation's capital, consists of 1,000 directing editors of daily newspapers throughout the country. Among the purposes of the Society is the ongoing effort to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

ANPA comprises nearly 1,400 daily and nondaily newspapers throughout the United States. Its membership constitutes approximately 90 percent of the total daily and Sunday circulation in the United States and a substantial portion of the weekly newspaper circulation as well.

Mr. Chairman, press organizations are the outspoken defenders of open government. We are privileged to have as our job the monitoring of government and the distribution of information about public life. We best execute our mission where we function as the eyes and ears of citizens who would watch and listen to the activities of government themselves if they just had the time to do it. Where government acknowledges its duty to be watched and listened to, it not only helps us do our jobs, but it strengthens the premise of democracy: Governments derive their just powers from the consent of the governed.

The Government in the Sunshine Act, 5 U.S.C. 552b, is not a perfect law, but it is an important one. It applies only to commissions and agencies headed by a collegial body composed of two or more individual members. Thus limited, it leaves much of the executive branch untouched. But, despite its limits, it should expose a substantial area of public power to independent scrutiny--if it works right.

We have come to believe, after conducting a very informal survey of our colleagues in preparation for this oversight hearing, that the law does not work as well as it might. It seems to have encouraged agencies to conduct well-scripted meetings to fulfill the formalities of the law and to erect memorials to decisions that actually occurred outside the public view.

Some critics of the Act have noted this trend also and their solution is to further weaken or repeal the law so commissioners and senior agency officials would conduct even more business in private. That, in our view, is exactly the wrong solution. Rather, we propose, Congress should continue vigorous oversight of the law to ensure that its spirit as well as its letter is followed.

The U.S. Supreme Court decision in ITT World Communications v. Federal Communications Commission, 466 U.S. 463 (1984), could be read in some quarters as an official imprimatur upon these scripted meetings. By permitting agency members to conduct significant policy discussions and fact-finding in private, the Court removed from view an important part of the process by which public policy is eventually formed.

The ITT case presented the court with the always-difficult task of finding the right balance between public accountability and private deliberation. The case involved a visit by three Federal Communications Commission members to

international telecommunications policy meetings. The group did not constitute a quorum of Commission, but it did constitute a quorum of the Telecommunications Committee of the Commission. It attended the meetings to advance the all-important goal of improving access to foreign markets for American telecommunications firms.

We cannot know a great deal of what transpired there because the public was not admitted, but none of us can deny that the topic itself was one of tremendous public interest and potential impact. We can only suppose that the Commissioners learned something there that enabled them to better set or carry out public policy.

ITT had a particular interest in the meeting because it is one of the service providers involved in the international markets. Neither its representative nor other members of the public, however, were admitted. ITT attempted to enforce Sunshine Act obligations upon this and similar gatherings.

The Supreme Court held that the Commissioners' presence at the event did not constitute a meeting. It said that because the Committee was not there to take formal action, the members were acting outside the scope of their officially delegated authority. Their "exchange of views" with foreign counterparts did not require public attendance.

The decision was troubling enough on its own facts. International telecommunications will make our shrinking world even smaller and they will inevitably sharpen public debate over world trade and competition among nations. It may well be that the only "outsiders" interested in the consultative process in that particular instance were corporate citizens, but where they are excluded, the general public is excluded as well.

But far beyond the implications for national telecommunications policy, which is interesting in and of itself, the ITT decision closes doors and windows where the need for discussion and public awareness demands openness.

We see two problems with the Court's narrow reading of the Sunshine Act. First, it seems to invite scrutiny only of those acts that commissioners were legally empowered to make. That seems to leave us in the dark about those actions that they are not legally empowered to make. The potential for abuse of such a rule requires little imagination.

Second, and more important, even where there is no quarrel with the legality of an action, the ITT rule blinds us to information that we may need truly to understand why and how our government arrived at its own positions. When government officials go about their jobs, they act in our names, they speak for us and they form opinions that we need to know. If we are offered only the formality of a commission vote or an agency's final decision by way of public explanation, we will be ignorant indeed.

The Sunshine Act has always had its critics. But recent years have produced a number of thoughtful public officials who disagree with it. SEC Commissioner Bevis Longstreth advanced the argument five years ago that "a little shade, please" was needed to prevent the sunshine act from scorching collegiality. The Administrative Conference of the United States also questioned how efficiently an agency could work in the sunshine.

What these people seem to be saying is that democracy is fine in its place, but you really can't get much done that way. Probably it's true that government could function more quickly in private, but that doesn't necessarily mean it would function better. Public officials undoubtedly do speak more candidly to their own colleagues and to those who understand

political realities. But that doesn't necessarily mean they speak with greater wisdom or insight simply because they speak in private.

It is surprising, sometimes, how often we have to remind ourselves that democracy doesn't necessarily promise efficiency and it doesn't offer comfort to those who cannot tolerate disagreement. The consent of the governed, so succinctly lauded in our Declaration of Independence, requires knowledge and knowledge requires access to information. Sometimes that is a cumbersome principle, but we ignore it to our ultimate detriment.

For the most part, we agree with Senator Chiles's statement in 1983 ("The Sunshine Act Does Too Work," Washington Post, August 4, 1983, attached for reference) that most agency members are "committed to the public good and do their best to achieve that good".

That said, we ought not forget Justice Brandeis's comment that "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. " (Olmstead v. United States, 277 U.S. 438, 478 (1928)).

But one need not distrust either the motives or the actions of government officials to believe that both benefit from exposure. The point, I believe, is not that skulduggery is exposed by sunshine, but that the absence of skulduggery is exposed. People do not long trust what they cannot know or understand. Government will not long have their consent.

Does the Sunshine Act work? It stands for open government. In that sense, it works through its very presence.

But to test its pragmatic value, we conducted an informal survey last year of five Washington news bureaus.

Does the Sunshine Act work? we asked. Are there any problems with it?

No problems, came the near uniform report.

We were surprised. Nothing in Washington works that well, except maybe Easter recess.

So we checked back with the bureau chiefs.

Do you always get admitted to the meetings you want to cover? we asked.

Yes, I guess, came the reply. But the commissioners don't do their business in the meetings. They only read their lines.

I paraphrase my colleagues here. And I do not point the finger at any one agency because my colleagues did not do so. But I get the clear message that open meetings laws do not necessarily produce open meetings. They should but they don't.

Those who insist that open meetings laws themselves are the cause of this malady are wrong. The cause is our willingness to tolerate rehearsed plays to create a record of something that went on behind the scenes. Democracy deserves better. Congress and the public and the press must not be satisfied with a charade.

Neither our organizations nor any reasonable person would suggest that there is no need for exemption from public discussior at times. But we believe Congress has shown through the Freedom of Information Act and state legislatures have shown through their own open meetings laws that a reasonable balance is possible; and where it is reasonable, the balance can be observed by agencies without deterring effective operation. Congress, in fact, might examine what some states have done to improve open meetings laws. The

Sunshine state itself, the great state of Florida, is noted for its vigorous enforcement and oversight of open government laws.

Although the Government in the Sunshine Act is not the paradigm of effective open government laws, it carries moral suasion because of its prominence. The failure of the federal government to observe, and of courts to enforce its principles, will justify the ends of those in the states as well as in Washington who find too much sunshine uncomfortable.

The Government in the Sunshine Act is an important law. We do not know whether it is being followed to the letter, but our little survey persuaded us that it is not being followed in spirit.

Congress has no more important mission than to ensure that agencies to whom it has delegated public business act within the public interest. The laws of open government are the frontispiece to the public interest. Neither the Congress nor the press nor the citizens nor the government itself can sit idly by if openness is sacrificed to comfort or convenience. We welcome the subcommittee's vigorous oversight and we are happy to assist in that task.

UNION OF CONCERNED SCIENTISTS 1616 P Street, NW S.310 · Washington, DC 20036 · (202) 332-0900

UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS

SUBCOMMITTEE ON FEDERAL SPENDING, BUDGET, AND ACCOUNTING

HEARINGS ON THE GOVERNMENT IN THE SUNSHINE ACT

APRIL 19, 1988

TESTIMONY OF ELLYN R. WEISS
HARMON AND WEISS
2001 S STREET, NW
WASHINGTON, D.C. 20009
GENERAL COUNSEL, UNION OF CONCERNED SCIENTISTS

Thank you for the invitation to appear here today. I have been General Counsel for the Union of Concerned Scientists (UCS) for over ten (10) years and have also represented states and citizen's groups in many cases before NRC since 1973.

Over the past several years, the sun has not shone much over the Nuclear Regulatory Commission. While the Sunshine Act has not been significantly amended- despite the agency's efforts to persuade Congress in 1985 to loosen its provisions- the Commission has become more expert in exploiting the available mechanisms to avoid meaningful deliberation of the issues before it in public.

This can perhaps best be seen in the agency's broad use of

notation voting and so-called "affirmation sessions." There are others appearing before you who can give an insider's view on how the use of these mechanisms has evolved. It is certainly my observation over the past 15 years that they have come to virtually replace substantive public disclosure. As CRS has documented, NRC places no restrictions on the type or importance of the issues which may be resolved in this manner. So long as the NRC believes that no "interactive discussion among all Commissioners in the presence of each other" is necessary, papers are circulated between the Commissioners and the Secretary of the Commission until a decision is reached. A public meeting is then held during which the sole action taken in public is that the Commissioners "affirm" their written votes by saying yes or no in response to the call of the roll. None of the circulated materials are ordinarily made public, other than the final decision.

I am aware that there is a school of thought that Congress should essentially "ratify" the practice of those agencies which most strongly resist sunshine by broadening the Act's exemptions to allow some type of deliberations to be held behind closed doors. I disagree with that view. I believe that Congress struck the correct balance between public access to the decision-making process in a democratic society and the need to protect the ability of the federal agencies to carry out their responsibilities. Public policy in this area should not be driven by the agencies most fearful of and resistant to public

scrutiny.

It is not the Sunshine Act that has caused public collegial deliberation to disappear at the NRC nor will any changes restore collegiality, as much as one would like to see it restored. NRC has for the past seven years mounted a substantial and across-the-board assault on public participation in its decision making. It has amended its rules to make many important actions, previously subject to prior notice and hearing opportunity, no longer so (see 10 CFR 50.59); it has repeatedly told its Licensing Boards that they may not inquire into issues that they have found to raise "serious safety matters"[1]; it has attempted to remove whole classes of issues relating to emergency preparedness from the public hearing provisions of the Atomic Energy Act. This last effort was struck down by the U.S. Court of Appeals in Union of Concerned Scientists v. N.R.C. 735 F.2d 1437 (D.C. Cir. 1984). These are just a few examples of the prevailing climate of public phobia at the NRC. The Commission's disdain for the Sunshine Act is only one piece of the larger mosaic.

What is needed at NRC is Commissioners who understand that their first and overriding obligation is to the public. It is my hope and expectation that that will happen in the future. When it does, I am sure that the Commission will not find the Sunshine

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[1]. See e.g. Southern California Edison Co., et al. (San Onofre Nuclear Generating Station, Units 2 and 3). CLI-81-32, 14 NRC 1091 (1987). Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1115, (1981).

Act an unreasonable intrusion into its deliberative processes. It would be a great mistake to accommodate the public's rights under the Sunshine Act to the NRC's phobic fear of exposing itself to view.

The dangerous consequences of closed-door decision-making can be plainly seen in a remarkable set of transcripts of NRC secret meetings concerning whether to start TMI-1. Transcripts of these meetings were released, pursuant to a court order in the case of Philadelphia Newspapers v. N.R.C., 727 F.2d 1195, (D.C. Cir. 1984), holding that the meetings had been illegally closed. They show among other things, systematic subversion of the intent of the rules against ex parte contact- an agency spoon-fed one version of the facts by its staff at the time that the staff was a formal party to the underlying case and advocating the company's position. The other parties, who were utterly shut out of this process, had no way to know what the Commission was considering, much less an opportunity to present the facts on the other side. UCS protested this exclusion repeatedly with no success.

Of course, the Sunshine Act is intended to prevent exactly what the NRC was doing. If properly implemented, the Act furthers several goals, not the least of which is better government decision-making. Agencies make better choices when they have heard all the evidence and arguments on all sides. This can only be ensured if decisions are made in public. When they go behind closed doors, experience clearly shows that only

the most powerful voices penetrate. Secrecy invites abuse.

This Committee deserves much credit for refusing to abandon the principles of the Sunshine Act and I am confident that you will continue to do so.

STATEMENT

OF THE

WOMEN'S LEGAL DEFENSE FUND

Senator Chiles, Senator Glenn, and other distinguished members of the Subcommittee, my name is Claudia Withers, and I am Director of Employment Programs at the Women's Legal Defense Fund. We appreciate the opportunity to testify before you about our experiences pertaining to "government in the sunshine". We focus in this testimony on the Equal Employment Opportunity Commission.

The Women's Legal Defense Fund is a private, nonprofit membership organization founded in 1971 to eliminate sex discrimination in the law, primarily in the areas of family law and employment. We employ a variety of strategies to achieve our goal, including monitoring and advocacy, counseling and pro bono litigation, and public education.

As part of our effort to advance the law in the area of employment, and to ensure that women achieve true equal employment opportunity, WLDF has monitored the activities of those agencies charged with implementing the antidiscrimination laws: the Equal Employment Opportunity Commission, the Department of Justice, the Office of Federal Contract Compliance in the Department of Labor. We comment on proposed regulations, meet

with agency officials about policy proposals and their impact on women workers, attend public sessions sponsored by agencies and collect data about agency performance. We provide technical assistance to Congress as it fulfills its' oversight responsibilities. We share the information that we have collected with our constituency and the public so as to affect for the better the development of agency policy and to make the agency more accountable for its actions.

As part of our monitoring activities, we have sought, as members of the public, to attend regularly the open meetings of the Commission. In 1985, after almost weekly attendance for a number of months in succession, it became clear to us that the EEOC conducted little business of any real substance at its public sessions. It appeared that substantive issues were discussed in detail outside the public meetings. In the meetings at which we were present, the "open meeting" generally consisted of a barely audible presentation by a staff person followed by some discussion from the Commissioners. In many cases, the only reason we understood anything at all about the topics being discussed was that we followed EEOC activities regularly. The open portion of meetings were very short; the average length of time was five to ten minutes. Attempts to get copies of documents that were discussed at the meeting took patience and perseverance. They were never available to us at the meeting; we had to follow up with individual staff members afterwards. Often

Commissioners referred to documents which were not available to us. On a number of occasions, meetings were cancelled or rescheduled with little notice; often we arrived at a scheduled 9:30 a.m. meeting only to discover that a decision to cancel the meeting had been made at 5:00 p.m. the night before. Similarly, agenda items were rearranged at the last minute, making it difficult to know beforehand what topics might be covered at a particular meeting. Issues were often decided by "notation vote", that is, a vote taken outside of the meeting after information on an issue is circulated to Commissioners' offices. The item voted on is then announced at the next Commission meeting.[1] Using such a method of moving Commission business effectively excludes the public from any understanding of how policy positions were determined.

Because we were concerned that little policy was being made "in the sunshine", we filed a series of Freedom of Information

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[1] According to the information that was provided to us, notation voting may be used in the following situations:

a) matters of a ministerial nature;

b) matters of an emergency nature;

c) scheduling of meetings in less than seven days and changes in a meeting agenda under the Sunshine Act; and

d) Commission decisions or ther matters, for which notation voting procedures have been approved or will be approved in the future by the Commission.

A full description the the Commission's notation voting procedures as provided to us is included as Attachment 1 to this testimony.

Act (FOIA) requests in January of 1986 to obtain more information regarding EEOC policy making. We requested access to such information as minutes and transcripts of EEOC meetings, records of meetings of special assistants to the EEOC, and correspondence between special assistants and EEOC Commissioners. We also requested a waiver of processing fees on the premise that our primary interest in the information was to benefit the public.

We were informed that some of the information that we asked for was in the public domain; we were not made aware of this, however, until after we had filed FOIA requests. Our request for a fee waiver was denied; the Commission decided that the information that we sought "was not primarily for the benefit of the general public, but for the primary benefit of [WLDF's] specific constituency." The Commission also challenged WLDF's qualifications to monitor the EEOC or disseminate information. It contended that our requested fee waiver was unnecessary because Congress monitors the agency.

We appealed the denial of the waiver of processing fees. When our appeal was denied, we filed a lawsuit, asking the district court to grant our request for a fee waiver, order the EEOC to produce the information that had been withheld, issue a finding that the EEOC acted in an arbitrary and capricious manner, and award costs and attorneys' fees. We were represented by attorneys from Public Citizens Litigation Group.

We settled the case in November of 1986. Under the terms of the settlement agreement, the EEOC waived all search and duplication fees for non-exempt records that were responsive to our request. The EEOC paid attorneys fees and costs. We felt at the time that the settlement of this case was an important step in making the agency aware of our concerns, and in making the EEOC's policy development process a more open one, and one thus more accountable to the public.

As a result of filing the FOIA requests and settling the lawsuit, we were able to listen to transcripts of earlier EEOC open meetings and review minutes of earlier EEOC open meetings. We observed generally from the information that we saw that the discussions of substantive issues appeared to be more lengthy during the years before 1981. We noted a heavier reliance on the use of notation votes beginning in 1982, which meant that there was no public discussion of some issues. Meetings began to be taped around 1984, but it was often quite difficult to follow what was going on in a meeting from the taped transcripts that we listened to. The provision of background documents was inconsistent.

We don't believe that the process has become more open as a result of our lawsuit. While we have not been able to attend as many EEOC open meetings in the past year as before, our

impression is that the Commission is conducting "business as usual" from the standpoint of developing policy "in the sunshine". There does not appear to be a regular meeting time for the open sessions. The phone number which is given in the Federal Register for obtaining information about meetings often rings unanswered or provides incorrect information. On several occasions WLDF staff that have attempted to attend open EEOC meetings have missed such meetings by being only a few minutes late. On at least two occasions, WLDF staff members attempting to attend an open meeting of the EEOC have had problems getting past guards, who explained that they had not been told to "expect anyone"!

Because WLDF and other civil rights organizations have focussed on the EEOC and other agencies for a number of years and have developed some amount of expertise on the substantive issues, we find other ways to find out about and have an impact on the policy making process, including participation in Congressional oversight activities.[3] However, we are

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[3] Of course, we are often unsuccessful in our efforts. This Committee is certainly aware of the Commissions recent problems concerning enforcement of the Age Discrimination in Employment Act. While the ADEA is not our primary focus, we work closely with the American Association of Retired Persons (AARP) and are aware of their monitoring activities. We understand that on the issue of ADEA waivers, the EEOC opened up the issue for public comment while at the same time surreptitiously changing its enforcement position in ongoing litigation. The result was that the EEOC preordained the outcome of the rulemaking process by playing a role (which was unannounced) in the litigation.

disadvantaged by a policymaking process about which we can only complain after the fact, and which thus suffers from the lack of contemporaneous input. It is clear that individuals and groups who have less experience (and less time) but who clearly have a right to participate, are severely disadvantaged by a process which may adhere to the letter of the Sunshine Act, but which sorely tests its' spirit.

The Equal Employment Opportunity Commission is responsible for administering laws and developing policy which ensure equal employment opportunity for all workers. That responsibility includes ensuring that the public gets a fair chance to participate in the decisionmaking process. Our experience would indicate that we are not getting such an opportunity.

Attachment 1

rec'd 4/16/81.

Commission Procedure
Notation Voting Procedures

1. Notation voting may be utilized when the following are involved:

a) matters of a ministerial nature as defined herein;

b) matters of an emergency nature, as defined herein;

c) scheduling of meetings in less than seven days and changes in a meeting agenda under the Sunshine Act; and

d) Commission decisions on other matters, for which notation voting procedures have been approved or will be approved in the future by the Commission (e.g., Commission Decisions, subpoena determinations, amicus participation, etc.)

As to items 1a), b) and c), the following procedures shall apply:

2. If any Commissioner or the General Counsel wishes to bring to the attention of the Commission a matter to be resolved by notation vote, he or she shall submit such item to the Chair. Any office head wishing to bring to the attention of the Commission a matter to be resolved by notation vote shall submit such item to the Executive Director. The Executive Director or the General Counsel will submit all notation voting items to the Executive Secretariat for circulation.

3. A cover memorandum shall be attached to the item to be considered by notation vote and shall explain whether the item is of a ministerial or emergency nature or a request to change the date or agenda of a Commission meeting. If the matter is of an emergency nature, the memorandum shall explain the nature of the emergency and the time frame within which Commission action should occur.

4. The Executive Secretariat shall circulate to all Commission members a copy of the item to be considered by notation vote.

5. Ministerial matters are: (a) all typographical changes, (b) changes in the language of an item, such changes having been previously directed by the Commission, and (c) technical changes. Technical changes shall include correction of citations. Where the Commission has considered a particular document and it is apparent, as a result of certain additions or deletions to various sections or numbered paragraphs within the body of such document, that some type of reordering or renumbering is necessary, the changes may be approved by notation voting.

6. An emergency matter shall consist of any urgent Commission business, whether substantive or ministerial, which requires resolution before the next scheduled Commission meeting. Members of the Commission may vote on an emergency matter in writing or by telephone. The Executive Secretariat shall attempt to contact by telephone any Commission member who is on travel in order to determine his or her vote. Proxy votes are not permissible. Any emergency matter which shall be resolved by notation vote must be ratified by the Commission at the next scheduled Commission meeting.

7. Upon receipt of an item to be considered by notation vote, each Commission member shall consider the matter and indicate his or her approval or disapproval. A vote which is subject to some condition or proviso shall be counted as a "nay" vote.

8. Each Commission member shall vote within 5 working days of receipt in his or her office of an item to be considered by notation vote unless it is an emergency matter. For an emergency matter, each Commission member must indicate his or her vote to the Executive Secretariat within the period of time defined by the cover memorandum.

9. A vote on an item becomes final when a majority of the Commission members have voted for or against the proposition. After the final vote is counted by the Executive Secretariat, the Executive Secretariat shall inform the Commission, the Executive Director, and the General Counsel of the result. An item which has been voted upon by notation vote shall be announced at the next Commission meeting and shall be included in the minutes of that meeting.

10. Once a vote is final, no Commission member may change his or her vote except in accordance with the rules of reconsideration, see §44 Roberts Rules of Order, and request for reconsideration must occur at the next regularly scheduled Commission meeting occurring after the notation vote.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

Statement by

Anne Graham, Commissioner

Before the

Subcommittee on Federal Spending, Budget and Accounting

Governmental Affairs Committee

United States Senate

April 19, 1988

I am pleased to appear today before the Governmental Affairs Committee, Subcommittee on Federal Spending, Budget & Accounting to discuss the importance of the Government in the Sunshine Act (Sunshine Act). This Act is based on a policy fundamental to the principles of a democratic government, that is, that the "public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government." 5 U.S.C. 552(b). I would like to preface my remarks by commending Chairman Chiles for recognizing the importance of the public's need to have access to the decision making process of the government and for being instrumental in the creation of the Sunshine Act. Without his dedicated efforts we would not be celebrating the 12th anniversary of the Sunshine Act.

I believe that the Sunshine Act has had a major and positive effect on the way government agencies do business. By opening the doors and giving the public access to the decision making process of collegial agencies, the Sunshine Act has strengthened accountability. The Act also continues to keep the policy makers of the various agencies from being isolated from public input. Further, the Act ensures that public officials are under the constant scrutiny of the public. I believe that this is particularly important at the Consumer Product Safety Commission because this body is concerned with health and safety issues.

Since its inception, the Consumer Product Safety Commission has been committed to the principle that in order to ensure public confidence and to fulfill its mandate to protect the consumer from unnecessary risks of injury associated with consumer products, the public needs to be involved as much as possible in its decision making process.

The Commission has taken the Sunshine Act a step further by adopting an internal regulation that provides that Commission business will generally be conducted in public. 16 C.F.R. 1012. That regulation requires that whenever Commissioners or Commission staff have meetings with members of the public involving matters of substantial interest, with limited exceptions, public notice of the meeting must be given and the public be permitted to attend.

The Commission's regulations not only require that the public have access to meetings, but that the public may participate in setting Commission priorities on the most serious hazards associated with

consumer products. The public is invited to make oral presentations to the Commission on their views as to what projects and activities should be given priority attention. This participation by the public gives the public, not only a chance to be informed, but also a real possibility of setting Commission policy.

The Sunshine Act deals with a delicate balance, a balance between providing the public with information and not impeding collegial agencies from conducting their regulatory responsibilities. I believe that this need to balance the requirements of public openness and the ability of the Government to carry out its responsibilities has been adequately addressed in the Sunshine Act. The Act and the legislative history make it clear that under specific circumstances meetings may be closed. Under the Commission's Sunshine Act regulations, for example, compliance meetings are exempted from the Sunshine Act, since having these sessions in an open forum could possibly interfere with potential or existing enforcement proceedings.

This question of the balance between public openness and allowing agencies to carry out their business was addressed in a 1986 American Bar Association report which concluded that:

> "The open meeting requirement has generated reluctance to discuss certain important matters; and discussions, when they occur [sic] may not contribute to achieving a consensus position."

This conclusion certainly does not reflect my experience at the Consumer Product Safety Commission. In my opinion, there has been no reluctance on the part of my fellow Commissioners or on my part to discuss candidly substantive issues that have come before the Commission. Thus, the Sunshine Act has not hindered the Commission in functioning. In fact, I believe the Sunshine Act has enhanced the debate and candor at the Commission.

While there may need to be some minor adjustments in the Sunshine Act in the future, I believe that any possible difficulties regarding the application of the Sunshine Act are far outweighed by the benefits that the Act provides the public. Specifically, I believe that a health and safety agency, such as the Consumer Product Safety Commission, needs to be under the constant vigilance of the public to ensure that its statutory mandate is being fulfilled.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

MAY 5 1988

The Honorable Lawton Chiles
Chairman
Subcommittee on Federal Spending
Senate Committee on Government Affairs
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for the opportunity to submit this letter for the record of the Federal Spending, Budget, and Accounting Subcommittee's April 19 hearing on the Government in Sunshine Act.

The Government in Sunshine Act, 5 USC 552b, permits the public to view meetings of the Equal Employment Opportunity Commission and other federal agencies composed of collegial bodies, but neither gives the public the right to participate in those meetings nor the right to any greater access to staff documents than the public has under the Freedom of Information Act. The Equal Employment Opportunity Commission is in full compliance with the Government in Sunshine Act.

All scheduled EEOC Commission meetings are announced in the Federal Register on a timely basis. In addition, the Commission provides a recorded announcement a full week in advance on future Commission open meetings. That telephone number is (202) 634-6748. Specific questions about the agenda can be directed to (202) 634-7243.

Agenda items can be placed by Commissioners as well as agency offices. Occasionally items are withdrawn. If there is sufficient time (3 to 4 working days) a Federal Register amendment will be issued. Any agenda changes are conveyed in the recorded announcements and the final agenda presented to all attending the meeting.

If all items for consideration are withdrawn in a timely manner, these changes will be announced in the Federal Register and changed in the recorded announcement. Rarely is a Commission meeting "canceled or rescheduled with little notice."

Open agenda items are consistently solicited and scheduled whenever possible. At every meeting, the open session consists of a summary of notation votes and may include comments, discussion, reports on operations and proposed policy statements.

Commission meetings start at the appointed hour when all expected Commissioners are in attendance. Security guards at the main entrance to EEOC's headquarters office building know the procedures for admitting members of the public during the open portion of the meeting. When the conference room door is closed, the Commission has gone into closed session.

Copies of the marked-up agenda for the open session and any materials to be presented are available at the meeting. If there are insufficient copies for any reason, additional copies can be requested either at the meeting or in a follow-up call to (202) 634-7243. Recordings of Commission meetings began soon after the Sunshine Act was passed in 1976.

The Commission uses a mixed state of the art audio system specially designed and installed in the conference room to amplify sound throughout the room. Each Commissioner, witness and staff person making remarks has an individual microphone.

After all open session topics have been discussed, the session is closed by Commission vote. All members of the public must leave at that time. A closed meeting is then held to discuss litigation authorizations and federal agency discrimination complaint appeals. The Government in Sunshine Act exempts from public disclosure any matter relating to an agency's decision whether to participate in a lawsuit. This exemption protects the law enforcement decisions of the Commission from disclosure of standards or theories used in the prosecutorial decision making process so that organizations cannot structure their operations to avoid prosecution of statutory violations.

The proportion of business conducted in closed EEOC meetings and the use of notation votes have grown since the Commission adopted its enforcement policy in 1984, which calls for each case in which cause is found and conciliation fails to be considered by the five-member Commission for possible litigation. The Commissioners consider numerous cases for litigation each week and often vote by notation whether to litigate. Notation votes are announced at the beginning of the open Commission meetings. More complex cases are discussed during closed sessions. Previously, many litigation decisions were left to the EEOC's general counsel.

The Commission lists each major regulatory initiative in its semi-annual agenda published in the Federal Register, and has consistently published proposed regulations in the register and sought public comment. Various interest group representatives meet often with individual Commissioners to express their views on pending policy initiatives.

The EEOC neither has changed its position nor argued that unsupervised waivers were permissible during the time EEOC was inviting public comments on the proposed regulation concerning waivers of private rights under the Age Discrimination in Employment Act.

While the Commissioners welcome comments and input from outside organizations, all final decisions on policy initiatives must be made without undue influence from special interest groups.

Again, let me reiterate that EEOC is in full compliance with the Government in Sunshine Act and continues to be sensitive to the right to public access.

Sincerely,

Clarence Thomas
Chairman

[From the Washington Post, August 4, 1983]

THE SUNSHINE ACT DOES TOO WORK

(By Senator Lawton Chiles)

Recently The Post published a commentary by Bevis Longstreth, a member of the Securities and Exchange Commission, entitled, "A Little Shade, Please" [op-ed, July 25]. In the middle of a Washington summer this sentiment struck a responsive chord—until I went on to read that the relief sought is from the Government in the Sunshine Act. The commissioner maintains that the act impairs the ability of federal agencies to fulfill their responsibilities and does not provide the public with useful information.

As the author of that statute, I am not surprised at this latest attempt to argue that public scrutiny inhibits effective decision-making by government agencies. All through the congressional process leading to enactment of the Government in the Sunshine Act, the agencies to be covered raised similar arguments. "Openness in government is a commendable idea, senator, but surely you can't expect us to function with the public and press looking on. It simply isn't practical." Having come from Florida, where a comprehensive sunshine statute has worked well, I didn't buy the argument then, and after six years experience with the federal statute I don't buy it now.

The purpose of the sunshine law is simple and basic. In passing the legislation (94-0 in the Senate; 384-0 in the House) Congress overwhelmingly stated that the people have a perfect right to observe the conduct of public business. With a few exceptions—national defense information, plans for criminal prosecutions or material that would constitute an invasion of privacy—there is no common-sense reason why citizens shouldn't be able to watch how government spends their money and reaches decisions affecting their businesses, their communities and their future. Citizens cannot hold government officials accountable if they don't know what those officials are doing.

As the Longstreth article indicates, the requirements of the sunshine statute continue to be a bone of contention with some regulatory agency members. In 1981, it was the Nuclear Regulatory Commission that went to court in an effort to avoid opening its budget meetings to the public. The court ruled in favor of openness. While these complaints have and most likely will continue to arise, there is no real evidence that the law interferes with the normal operations of any agency. At times I am sure it proves inconvenient, but that is a small price when weighed against the public's right to know.

Former chairman of the Federal Trade Commission Michael Pertschuk, in describing the FTC experience under the act, maintained, "Openness in government produces better policymaking and more effectiveness accountability, and we therefore encourage as much public scrutiny of FTC activities as is feasible."

The difficulties that are raised as a basis for criticizing the act, such as a loss of spontaneity or a restraint of frank conversation, really miss the point. Congress, in enacting legislation such as the Freedom of Information Act and the Government in the Sunshine Act, was not acting to serve the interest of federal agencies but rather the interest of the public. If one were to use a standard of what suits the agencies needs best, I am sure a good argument can be made to minimize public access and involvement.

The sunshine law, passed in the wake of the Watergate scandal, was part of an effort by Congress to remove the cloak of secrecy and reassert the tradition of democracy that government operate in the public. We sought through long hearings and negotiations to ensure that an agency's functioning would not be impaired, and I think we were successful. Frankly, we were not as concerned with the reluctance of an individual commissioner to speak his mind in public.

I think it is worth noting that sunshine represents one area of law in which Congress has not asked more than what it is willing to do itself. By House and Senate rule, committee meetings are open except those discussing national security information or other legitimately confidential information. Of course, there were dire predictions about the effect of these congressional rules on the deliberative process, but they have proven unfounded. It was a little awkward at first for members to speak their minds in the presence of the public and press, but it wasn't long before discussion was as frank as ever.

While my primary objection is with the failure to understand the point of open government, I also want to clarify several specific issues raised by the commissioner.

Longstreth finds fault in the fact that Cabinet agencies or single-headed agencies are not subject to the act. The rationale for covering only multiheaded agencies was

grounded in common sense and the nature of collegial agencies. Multi-headed agencies operate on the principle of give-and-take discussion between the members. There is a tradition of public dissent. While the agency takes a final action, it does not necessarily speak with one voice. Its deliberative process can and should be exposed to public scrutiny. The interior workings of a Cabinet secretary's decision-making process, on the other hand, may well be of great interest but are simply not accessible to public observation.

I would take issue as well with the notion that sunshine legislation aims in some way to mitigate what Longstreth calls "untoward interference." I did not push to open government meetings in order to expose corruption or conspiracy. I wanted to open the doors to educate the public or at least make sure the opportunity was available for that educational process.

I happen to think that most members of Congress and most agency members are committed to the public good and do their best to achieve that good. I want the public to be able to see that government does work and is usually working for them. My goal was and is to help redress the crisis in confidence, the crisis of people's lack of trust in their government. Excessive secrecy breeds rumors, suspicion and distrust. It insulates those who govern and alienates those who are affected by government decision-making.

Certainly no law is perfect, and perhaps there are areas in which the Sunshine Act can be improved. However, a critique that argues for a "modicum of darkness" aims at the heart of the law. To those who find open government inhibiting, I would remind them of President Truman's maxim about getting out of the kitchen.

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